

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

1285 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6064
TELEPHONE (212) 373-3000

LLOYD K. GARRISON (1946-1991)
RANDOLPH E. PAUL (1946-1956)
SIMON H. RIFKIND (1950-1995)
LOUIS S. WEISS (1927-1950)
JOHN F. WHARTON (1927-1971)

UNIT 3601, OFFICE TOWER A, BEIJING FORTUNE PLAZA
NO. 7 DONGSANHUAU ZHONGLU
CHAOYANG DISTRICT
BEIJING 100020
PEOPLE'S REPUBLIC OF CHINA
TELEPHONE (86-10) 5828-6300

12TH FLOOR, HONG KONG CLUB BUILDING
3A CHATER ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, U.K.
TELEPHONE (44 20) 7367 1600

FUKOKU SEIMEI BUILDING
2-2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100-0011, JAPAN
TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE
77 KING STREET WEST, SUITE 3100
P.O. BOX 226
TORONTO, ONTARIO M5K 1J3
TELEPHONE (416) 504-0520

2001 K STREET, NW
WASHINGTON, DC 20006-1047
TELEPHONE (202) 223-7300

500 DELAWARE AVENUE, SUITE 200
POST OFFICE BOX 32
WILMINGTON, DE 19899-0032
TELEPHONE (302) 655-4410

MATTHEW W. ABBOTT
EDWARD T. ACKERMAN
JACOB A. ADLERSTEIN
ALLAN J. ARFFA
DAVID A. ATKINS
SCOTT A. BERSHAY
JOHN F. BAUGHMAN
J. STEVEN BAUGHMAN
LYNN B. BAYARD
CRAIG A. BENSON
MITCHELL L. BERG
MARK S. BERGMAN
DAVID M. BICK
JOSEPH J. BIAL
BRUCE BIRENBOIM
H. CHRISTOPHER BOEHNING
ANGELO BONINO
JAMES R. BOODIN
DAVID W. BROWN
SUSANNA M. BUERGEL
PATRICK S. CAMPBELL*
JESSICA S. CAREY
JEANETTE K. CHAN
GREGORY J. CEPICA
ELLEN M. CHING
WILLIAM A. CLAREMAN
LEWIS R. CLAYTON
JAY COHEN
KELLEY A. CORNISH
CIRCEA C. CUMMINGS
CHARLES E. DAVIDSON
THOMAS V. DE LA BASTIDE III
ARIEL J. DECKELBAUM
ALICE BELISLE EATON
ANDREW EHRICH
GREGORY A. FAGO
LESLIE GORDON FAGEN
ROSS A. FIELDSTON
BRAS J. FINKELSTEIN
BRIAN P. FINNEGAN
ROBERTO FINZI
PETER FISHCHER
ROBERT C. FLEDER
MARTIN FLUMENBAUM
ANDREW J. FOLEY
ANDREW J. FORMAN*
HAROLD B. FREIDUS
MANUEL J. GALT
ANDREW L. GAINES
KENNETH A. GALLO
MICHAEL E. GERTZMAN
ADAM M. GIVERTZ
SANTINO GOGLIORMELLA
NEIL GOLDMAN
ROBERTO J. GONZALEZ*
CATHERINE L. GOODALL
ERIC GOODISON
CHARLES H. GOODE, JR.
ANDREW J. GORDON
UDI GROFMAN
NICHOLAS GROOMBRIDGE
BRUCE A. GUTENPLAN
ALAN S. HALPERIN
JUSTIN G. HAMILTON
CLAUDIA HERZBERG
BRIAN J. HERZMAN
MICHELE HIRSHMAN
MICHAEL S. HONG
DAVID S. HUNTINGTON
AMRAN HUSSEIN
LOREN A. JALALITO
JAREN JAHGORBANI
BRIAN M. JANSON
JEH C. JOHNSON
MEREDITH J. KANE

JONATHAN S. KANTER
BRUCE L. KARNS
PATRICK K. KARNS
JOHN C. KENNEDY
BRIAN KIM
DAVID M. KLEIN
ALAN W. KORNBERG
DAVID L. KRAMER
DAVID K. LIEBHEIM
STEPHEN P. LAMB
JOHN E. LANGE
GREGORY F. LAUFER
BRIAN C. LAVIN
XIAOYU LI
KEVIN LIU
JEFFREY D. MARELL
MARCO V. MASOTTI
EDWIN S. MAYNARD
DAVID W. MAYO
ELIZABETH R. MCCOLM
ALVARO C. MEBRILLA
MARIA F. MENDEZ-EGAN
CLAUDETTE MEREDITH-GOUJON
WILLIAM B. MICHAEL
JUDIE NO. SHORTELL*
CATHERINE NYARADY
JAMES O'BRIEN
ALEX YOUNG O'GH
BRAD R. OKUN
KELLEY D. PARKER
VALERIE E. RADWANER
CAROLYN REISNER
LORIN L. REINHOLD
WALTER G. RICCIARDI
WALTER RIEMAN
RICHARD A. ROSEN
ANDREW N. ROSENBERG
JACQUELINE R. RUBIN
CHARLES R. RUGG RULE*
RAPHAEL M. RUSSO
ELIZABETH M. SACKSTEDER
JEFFREY D. SAFERSTEIN
JEFFREY B. SAMUELS
DALE M. SARRO
TERESA SCHIEK
KENNETH M. SCHNEIDER
ROBERT B. SCHUMER
JOHN M. SCOTT
STEPHEN J. SHIMSHAK
DAVID R. SICILAR
MICHAEL SIEGMAN
STEVEN J. SIMKIN
JOSEPH J. SIMONS
AUDRA J. SOLOWAY
SCOTT M. SONTAG
TARIQ M. STEWART
ERIC ALAN STINE
AIDAN SYNNOTT
RICHARD C. TARLOWE
MONICA K. THURMOND
DANIEL J. TOAL
LIZZIE VELASQUEZ
LAWRENCE Q. WEE
THEODORE V. WELLS, JR.
STEVEN J. WILLIAMS
LAWRENCE I. WITDORFCHIC
MARK B. WLAZLO
JULIA WASON WOOD
JENNIFER H. WU
BETTY YAP*
JORDAN E. YARETT
KAYE N. YOSHINO
TONG YU
THEODORE A. ZACCONE
TAURIE M. ZEITZER
T. ROBERT ZOCHOWSKI, JR.

*NOT ADMITTED TO THE NEW YORK BAR

August 20, 2017

By ECF

The Honorable Cathy Seibel
United States District Judge
The Honorable Charles L. Brieant Jr.
Federal Building and United States Courthouse
300 Quarropas Street
White Plains, NY 10601-4150

International Business Machines Corporation v. Jeff S. Smith, No. 17 Civ. 5808

Dear Judge Seibel:

We are submitting this letter on behalf of Plaintiff International Business Machines Corporation (“IBM”) in response to the letter Defendant Jeff Smith submitted Friday evening (ECF No. 58) asking the Court to unseal various documents filed under seal and designated as confidential or highly confidential. The issues raised in Smith’s letter are not properly before the Court at this time because Smith has failed to abide by the procedures agreed upon by the parties and so-ordered by the Court in the Protective Order.

The Protective Order requires a party challenging confidentiality designations to send written notice to the designating party and to raise the challenge “in the first instance on an informal basis” and to attempt resolution of the challenge in good faith before seeking court intervention. The Protective Order authorizes the objecting party to apply to the Court for a ruling on the challenge only if “the challenge cannot be

Honorable Cathy Seibel

2

resolved on an informal basis," and it requires any such application to be preceded by "reasonable prior notice" by the objecting party to the designating party.

Smith abided by none of these requirements before he submitted his letter on Friday. Smith did not: (i) send us written notice challenging our confidentiality designations; (ii) attempt to informally resolve the challenge with us in good faith; or (iii) send us prior written notice before making an application to the Court.

This is not the first time Smith has attempted to raise confidentiality and sealing issues without following the parties' agreed-upon procedures set out in the Protective Order. He attempted to raise such issues in advance of and during an August 7 conference before Judge Davison, but Judge Davison agreed with IBM that this was not an urgent issue and that it could be addressed in the first instance in a meet-and-confer between the parties. Smith did not thereafter seek to meet and confer with us on this issue. Then, at an August 14 conference, Judge Davison granted the parties leave to move to unseal at the appropriate time, but did not suggest that the procedures in the Protective Order did not need to be followed.

Given these circumstances, Smith's request is premature and should be addressed, if at all, only after Smith follows the procedures in the Protective Order. Should Smith do so, we will of course work in good faith with his counsel to identify any portions of the record that may be publicly docketed. If, after those procedures are exhausted, any disputes between the parties remain, Smith can make an appropriate application to the Court at the conclusion of the hearing. If the Court would like to hear from the parties on these issues before then, we will be prepared to address them.

Respectfully submitted,



Robert A. Atkins

cc (by ECF): Counsel of Record